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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 732

ROOSEVELT RACEWAY, INC.,

Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR.
as COMPTROLLER of NASSAU COUNTY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

REPLY BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

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Statement

This reply brief is deemed necessary in order to show that appellant has failed to demonstrate that the challenged state statute is violative of the equal protection clause and to set forth additional reasons, not contained in the opinion of the court below and not considered by appellant, which support appellees' contention that the different local admissions tax treatment accorded harness and thoroughbred tracks by the State Legislature is constitutionally valid.

Summary of Argument in Reply

Appellant, Roosevelt Raceway, Inc., does not disagree with the basic legal principles applicable here. It concedes that if there is *any* conceivable justification for the legislative classification, it must be upheld as constitutionally valid and not violative of the equal protection clause. Appellant's Brief, p. 10.* That the different tax treatment is not discriminatory if based upon a reasonable distinction or a difference in state policy is equally indisputable. *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 528 (1959); *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910); *American Sugar Ref. Co.* v. *Louisiana,* 179 U.S. 89 (1900).

However, appellant misconceives the burden imposed by law where a tax classification is challenged. Thus, it is futile for appellant to take to task appellees for offering "not one shred of evidence or argument . . . to justify the 'classification' ". Appellant's Brief, p. 7. The burden is not upon the appellees to produce evidence to support the classification or to offer a logical explanation of what prompted the Legislature to permit the distinctive tax treatment for admissions to the two types of sport. Rather, the burden here is upon appellant (petitioner in the courts below) *to negate "every conceivable basis* which might support [the legislative classification]" (*Madden* v. *Kentucky,* 309 U.S. 83, 88 [1940]) (emphasis supplied), and if any state of facts can be so conceived, "the existence of that state of facts at the time the law was enacted must be assumed" (*Rast* v. *Van Deman & Lewis Co.,* 240 U.S. 342, 357 [1915]). Moreover, it is of no significance "that the facts may be disputed or their effect opposed by argument and opinion of reasonable strength." *Ibid.* See also, *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522, 528 (1959).

Appellant has failed to sustain its burden. The only distinctions between the two types of races that appellant concedes is that the gait of the horse and position of the

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* Reference is to "Brief of Appellant in Opposition to Motion to Dismiss or Affirm."

jockey differ. Appellant's Brief, pp. 6, 7, 8, 9, 12, 15. Despite appellant's preoccupation with, and reiteration of, such obvious and immaterial distinctions, it is noted that at no time have appellees urged that such distinctions are significant to support the separate tax classification for harness and thoroughbred tracks. Other differences, however, which do provide a reasonable basis for the classification, have not been adequately explained away by appellant. Any one of the differences noted by the court below or relied upon by appellees is adequate to support a distinction for tax purposes. Such differences, for example, are: (1) the nighttime operation of harness tracks as compared to the daytime operation of thoroughbred tracks; (2) the proximity of the harness tracks to New York City; (3) the profit-making character of harness tracks versus the non-profit thoroughbred sport; and (4) the longer racing season permitted for harness tracks than for thoroughbred tracks.

In reply, appellees will discuss appellant's failure satisfactorily to negate the distinctions noted in the opinion of the Court of Appeals and will set forth additional reasonable bases previously raised that support the classification but that were ignored by appellant on this motion.

I. Appellant has not met its burden of negating every conceivable distinction which supports the tax classification.

Appellant unsuccessfully attempts to demonstrate that the differences found by the court below to justify the tax classification were not significant or substantial. The materiality of these differences and the significance of the long-standing legislative practice of separate treatment for harness and thoroughbred tracks are discussed below.

A. THE NIGHTTIME OPERATION OF HARNESS RACING.

Appellant, for example, is "at a loss to imagine what . . . greater municipal expenses might be" involved because harness racing is permitted to operate only at night while

thoroughbred racing may take place only in the daytime and urges that it would be only fanciful conjecture to say the County furnishes more police traffic and security protection at night than during the day. Appellant's Brief, p. 10.

But, whether the cost of providing the same municipal services will be more expensive in the evening than during the daytime, or whether additional municipal services are required in the evening, or even whether such services are, in fact, provided at all, is not the principal consideration. The only relevant question is whether the Legislature reasonably could have conceived that such services might be required and that additional expenses might be incurred. That police services such as, for example, traffic control and investigations of crimes, are more expensive in the evening seems a reasonable proposition. If the court below concluded that the Legislature could have come to the conclusion that night operations might result in greater municipal costs than daytime operations, could not then the Legislature itself have reached the same conclusion? Statement as to Jurisdiction, p. 15a. That such distinction is adequate support for the classification seems obvious.

Moreover, the bald unsupported statement that "Nassau County furnishes no police, traffic or otherwise, to Roosevelt Raceway" (Appellant's Brief, p. 10) is not correct. The County does provide additional police for traffic control in the vicinity of the track during the racing season and supplies from time to time other police services at the track itself.

B. The Harness Tracks' Proximity To New York City.

The harness tracks affected by the enabling act and located in Nassau and Westchester Counties lack the vast public and private transportation facilities which are available to the thoroughbred tracks located in New York City (Aqueduct Racetrack) and on the boundary between Nassau and New York City (Belmont Racetrack).

A large number of the patrons of thoroughbred races in New York City come to the tracks via the City's mass

transportation network, such as the subway and railroad. But the situation is not the same for the harness tracks which are in suburban areas and are only accessible by highways. Thus, it may be conceived that Nassau County might be required to provide additional highway facilities and expend greater sums for road improvement and highway maintenance than is required to provide access to the thoroughbred tracks in New York City.

The Legislature, in authorizing a higher admissions tax, could reasonably have anticipated greater costs and expenditures by the suburban municipalities affected to provide access to the harness tracks than is required for the thoroughbred tracks in New York City. It could reasonably be conceived that Nassau County, for example, would be obliged to expend larger sums of money than New York City for road improvements, since the thoroughbred tracks in the City, including Belmont Track, which is partially in Nassau County, were already located on major arteries and could also be reached directly by means of public and private rail transportation. And, in fact, Nassau County did spend substantial sums to widen highways adjacent to appellant's track in order to accommodate the large attendance resulting particularly from the modernization of appellant's facilities with state financial assistance.

The Legislature could reasonably have concluded in 1956, when it granted financial assistance to appellant to rebuild, expand and modernize its track facilities, that Nassau County would be required to expend substantial sums for highway improvements and continuing maintenance. The permission to increase the admissions tax rate to harness tracks was granted to Nassau County in the very same statute that provided state financial aid to appellant's track to modernize its facilities.

It is not incumbent upon the Legislature to weigh in detail the comparative financial requirements and resources of the localities affected by the different types of tracks. In any event, the Legislature may have considered that modernization of the thoroughbred tracks in the City would not impose relatively as large expenditures upon

New York City, primarily because of the existence of adequate highways and availability of public and private rail transportation.

C. New York Has Long Recognized the Significant Distinctions Between Harness and Thoroughbred Tracks by Consistently Placing the Two Types of Racing in Separate Classifications for Purposes of Both Taxation and Regulation.

The court below noted the long-established state policy, reflected in the consistent practice of the Legislature, of according harness and thoroughbred racing distinctive treatment not only in regulatory legislation but in tax matters as well. Statement as to Jurisdiction, pp. 12a-13a. The long history of the different statutory treatment is well documented in *Matter of Murtha* v. *Monaghan*, 1 A. D. 2d 178, 148 N. Y. S. 2d 615 (1st Dept. 1956), *aff'd*, 2 N. Y. 2d 819 (1957), *reargument denied and remittitur amended*, 3 N. Y. 2d 880, *cert. denied*, 355 U. S. 891 (1957).

In matters of taxation, the State, for example, levies a tax on pari-mutuel betting at harness tracks at a different rate than on thoroughbred tracks. Compare L. 1940, ch. 254, as amended, §§9 and 9-a with §45, McK. Unconsol. Laws, §§7959, 7960, 8019. Despite appellant's attempt to rationalize this favorable tax treatment on the basis of the volume of betting at the different tracks (Appellant's Brief, p. 12), the simple answer is that the percentage of the betting pool taken by the State at the different tracks will differ, as will the portion of the pool retained by the tracks. And why is a distinction for one tax permissible and for another tax not proper if, as appellant urges, there is no difference in the two sports to support a different classification for tax purposes? In any case, the pari-mutuel tax provides an example where the State has treated the two types of tracks as being in separate categories for tax purposes.

Another distinction in treatment was made by the Legislature in providing different financial assistance in separate statutes to each type of track for modernization of facilities. Compare L. 1956, ch. 837, with L. 1955, ch. 813, and L. 1957, ch. 355, McK. Unconsol. Laws, §§7954, 7959, 7960, 7972. The Legislature was persuaded to provide state financial assistance with the understanding that greater patronage would result in a corresponding increase in tax revenue for the state. A direct result of this modernization of harness facilities was, of course, increased revenues for the harness tracks. While the thoroughbred tracks received substantially more than the $40,019,706.67 of state financial aid allowed the profit-making harness tracks, including appellant's track, it does not follow, as appellant urges, that the rate of admissions tax should bear a relationship to the state financial assistance. Appellant's Brief, p. 13.

Moreover, it was the same statute which provided financial assistance to appellant to expand and modernize its track that contained the increase in the permissible local admissions tax rate. It certainly might reasonably have been anticipated that the enlarged facilities would require substantial additional local expenditures.

II. Additional reasons, not discussed in the opinion of the court below, provide a reasonable basis to support the different admissions tax treatment accorded harness and thoroughbred tracks.

In appellees' brief in the court below, several additional reasons were expressed to support the tax classification made by the Legislature. Since the court below indicated the legislative motive in establishing the classification was not known, it stated only some examples or instances that are reasonable justification for the statutory classification. The instances cited by the court below were by no means exhaustive. Some additional reasons that support the classification are now discussed.

A. HARNESS TRACKS ARE PRIVATE ENTERPRISES ENGAGED IN BUSINESS FOR PROFIT, WHILE ALL THOROUGHBRED TRACKS ARE OPERATED BY A NON-PROFIT ASSOCIATION; THIS DISTINCTION IS SUFFICIENT REASON FOR THE SEPARATE CLASSIFICATION.

Roosevelt Raceway, Inc., whose economic interests motivated this law suit, is a corporation engaged in business for profit, may earn income and pay dividends to its stockholders. L. 1940, ch. 254, §37, as amended, McK Unconsol. Laws, §8003. All harness tracks in New York State are engaged in business as profit-making enterprises. But thoroughbred tracks are conducted only by a non-profit racing association which is barred by law from paying out or distributing any of the assets of the association "by way of dividend or otherwise."* L. 1926, ch. 440, as amended, McK. Unconsol. Laws, §§7902, 7910.

A race track which may earn a profit and return it to its shareholders is clearly in a separate class from, and a different business than, a non-profit track.

The equal protection clause is not violated because a particular class is selected for taxation or because unequal treatment is accorded different classes of taxpayers, *E.g., Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937). Nor does the equal protection clause forbid the state to select for taxation one class within a designated category while either leaving untaxed, or taxed at a different rate, other classes within the same category. See *e.g., Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Different businesses may be taxed differently (*State Board of Tax Commissioners* v. *Jackson*, 283 U.S. 527, 537-38 [1930]), and the state "may select or exempt without constitutional limitation whatever business classifications it deems proper." *People ex rel.*

*Although the state statutes permit incorporation of profit corporations as well as non-profit corporations for the purpose of conducting thoroughbred horse race meetings, the only thoroughbred tracks presently in operation are operated by a non-profit association.

Moffett v. *Bates,* 276 App. Div. 38, 39, 93 N.Y.S.2d 313, 315 (3 Dept. 1949), *aff'd.* 301 N.Y. 597 (1950), *cert. denied,* 340 U.S. 865 (1950).

"The power of taxation necessarily involves the right of selection, which is without limitation provided all persons in the same situation are treated alike . . . ." *People ex rel. Hatch* v. *Reardon,* 184 N.Y. 431, 445 (1906), *aff'd,* 204 U.S. 152 (1907). It seems beyond dispute that a business permitted by law to make a profit is not in the same situation, class or category with a non-profit association. See the last paragraph of the opinion of the court in *Ampco Print-Advs. Corp.* v. *City of New York,* 14 N.Y. 2d 11, 25 (1964), *appeal dismissed,* 379 U.S. 5, where there is set forth "a considerable list of tax laws validated by the United States Supreme Court which upheld taxing discriminations as to the justice and reasonableness of which judgments might differ." Statement as to Jurisdiction, p. 14a.

The profit and non-profit dichotomy for purposes of tax classification is not novel. The tax laws of New York and federal tax statutes as well are replete with provisions affording different tax treatment to non-profit enterprises *vis a vis* those operated for private gain. *E.g.,* L. 1947, ch. 278, §1, as amended, McK. Unconsol. Laws, §9451 (e) (granting counties outside of New York City authority to impose admissions taxes but *exempting* certain charitable, educational, religious and *non-profit organizations*) (since repealed by L. 1965, ch. 93, §5); Tax Law, §1230 (*exempting* religious, charitable, educational and certain other *non-profit agencies* from certain taxes by localities authorized pursuant to Tax Law §1201 *et seq.*); Tax Law §1116 (*exempting* religious, charitable, scientific, educational and other *non-profit agencies* from state sales tax); Real Property Tax Law, §§ 420, 490 (*exempting* real property owned by *specified non-profit corporations or associations* from local government real property taxes.)

Among the non-profit organizations exempt from real property taxes in New York under the Real Property Tax Law are: fraternal organizations (§428); theatrical corporations created by Act of Congress (§432); medical societies (§474); medical and dental indemnity and hospital service corporations (§486).

Examples of non-profit organizations exempt from federal income taxes include: agricultural organizations, business leagues, boards of trade, chambers of commerce, civic leagues, clubs, credit unions, community chests, co-operative associations, farmers cooperatives, insurance associations, labor organizations, lodges, pension trusts, real estate boards, and scientific organizations. 26 U.S.C. 3501.

The former federal excise tax on admissions (68A Stat. 497 [1954]) (repealed 79 Stat. 145 [1965]) expressly exempted not only admissions charged by churches, educational institutions, charitable fund and veterans' organizations, but also such non-profit enterprises as agricultural fairs, rodeos, government-operated swimming pools, bathing beaches, skating rinks and other physical exercise facilities, amateur theater performances and certain amateur and semi-professional baseball games. 68A Stat. 498 (1954).

The long history of distinctive tax treatment accorded profit and non-profit ventures supports the conclusion that the profit-making harness tracks are in a different class or category and may be treated differently from the non-profit thoroughbred tracks insofar as the local admissions tax is concerned.

B. A Longer Racing Season is Permitted for Harness Tracks Than for Thoroughbred Tracks.

The Legislature periodically prescribes the length of both the harness racing and thoroughbred racing season in each year. Since 1956, when it first authorized a higher admissions tax for harness racing, the Legislature has consistently permitted a longer racing season for harness meet-

ings in Nassau and Westchester Counties than for thoroughbred meetings in New York City. The harness season is presently approximately forty-nine weeks each year, while thoroughbred meetings are limited to approximately thirty-seven weeks.

It is reasonable to presume that the longer harness racing season could be a factor supporting the higher local admissions tax. It could have been anticipated that there would be greater municipal costs attendant upon a lengthier season. The conduct of harness racing during winter months may also be conceived to have been a factor since the cost of municipal services for the track may be greater at that time than during other months of the year. The Legislature may very well be presumed to have authorized the higher local admissions tax to offset these reasonably conceivable increased municipal costs.

CONCLUSION

For the foregoing reasons and those stated in the brief filed in support of the motion to dismiss or affirm, the appeal should be dismissed, or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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December 31, 1966.